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ABSTRACT

The practitioner advising a school board in connection with a reduction in force can appreciate that the board has great flexibility in implementing its decision. As long as the board's actions are not arbitrary, capricious, or pretextual, and they afford minimal due process protections to tenured teachers, the board's decisions will withstand judicial scrutiny. Since no charges are brought against teachers who are laid off in such cases, due process requires only an opportunity for a hearing on whether the reduction-in-force decision had a substantive basis. Most courts have accepted either program changes (due to declining school enrollment) or financial exigencies (due to budget cuts) as substantive reasons for trimming professional staff. In order to justify retaining qualified probationary teachers over tenured teachers, school boards need to demonstrate objectively that the tenured teacher lacks the qualifications for replacing the probationary teacher. In general, school boards have wide discretion and autonomy for ensuring that qualified teachers staff classrooms. (TE)

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Current Issues in Reductions-in-Force

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INTRODUCTION

In recent years, school districts across the country have been faced with the necessity of trimming teacher staffs in response to economic conditions. In accomplishing this, school boards have been faced with the problem of making reduction in force decisions that do not conflict with the statutory rights of tenured teachers. In this regard, there are some general areas of concern that a school attorney should be familiar with in advising a school district on matters related to a reduction in force. Those are:

- The nature of a tenured teacher's due process rights in a reduction in force situation.
- The necessity of insuring that a reduction in force is not simply a pretext for terminating a tenured teacher.
- The extent to which a school board may consider the qualifications of individual teachers in making a reduction in force decision, especially in connection with the decision to retain a non-tenured teacher over a tenured teacher.

Familiarity with these issues will give school boards the necessary flexibility in making reduction in force decisions, while at the same time insuring that those decisions are made for legally supportable reasons.

DUE PROCESS IN A REDUCTION IN FORCE

The grant of tenure confers significant rights on a teacher, the most important of which is an objective expectancy of continued

employment. To insure this, tenure statutes typically provide that a tenured teacher may only be dismissed for the relatively narrow reasons enumerated in the statute, and set up detailed procedural due process mechanisms to be followed in dismissing a tenured teacher.

For example, in Colorado the statutory dismissal proceedings commence with a formal filing of charges with the board of education, which either accepts or rejects them. If the board accepts the charges, the teacher is afforded the opportunity for a full adversary hearing on the dismissal before a hearing officer who makes finding of fact, which are binding, and a recommendation on whether the teacher should be dismissed, which is not. Upon receipt of the hearing officer's findings and recommendation, the board decides whether to retain or dismiss the teacher. The teacher may then obtain judicial review of an adverse decision by filing an action directly in the Colorado Court of Appeals.[1]

The question which arises in a reduction in force where tenured teachers are laid off is to what extent a tenured teacher's due process rights impact upon the school board's decision making powers. Although the various state tenure statutes are usually quite explicit in the procedures to be followed in dismissing a tenured teacher so as to guarantee due process, they are oftentimes noticeably vague when addressing the reduction in force situation. Again, Colorado provides an example of this. The only statutory guidance relating to a reduction in force states:

> A board may cancel an employment contract with a teacher on continuous tenure without penalty to the school district when there is a justifiable decrease in the number of teacher positions. When a justifiable reduction in the number of teaching positions within a particular endorsement area occurs, the contracts of non-tenure teachers who are occupying such positions shall be cancelled first.[2]

Irrespective of the lack of statutory mandates enacted to guarantee a tenured teacher procedural due process in a reduction in force, the courts have usually held that the grant of tenure nonetheless required certain minimal procedural due process standards to be followed when a tenured teacher is laid off. Specifically, the tenured teacher subject to a reduction in force must be afforded the opportunity for a hearing.[3]

However, the same stringent statutory requirements for the conduct of a dismissal hearing under the typical tenure statute do not apply to a

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1. Colo Rev Stat § 22-63-117.
2. Colo Rev Stat § 22-63-112(3).
3. Howell v. Woodlin School Dist. R-104, 596 P.2d 56 (Colo. 1979); Durfey v. Board of Educ., 604 P.2d 480 (Utah 1979); Johnson v. Board of Regents, 377 F. Supp. 227 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975).

reduction in force situation.[4] This is because in a reduction in force situation, no charges are being alleged against the teacher.[5] Therefore, only minimal due process standards need be met.

Those minimum standards have been defined to be:

- Notice of the proposed action in sufficient detail and timely enough to enable the teacher to present evidence relating to it.
- Notice of the reason and factual basis for the action.
- An opportunity to present testimony in the teacher's defense.
- A hearing before an impartial tribunal.[6]

In this regard, even an informal hearing before the board of education can satisfy these standards assuming timely notice has been given.[7]

Similarly, the issues to be decided at a reduction in force hearing can be restricted without offending the notions of due process. This is consistent with the judicial recognition that school boards are given broad exclusive discretionary powers, usually conferred by statute, to decide personnel and budgetary matters.[8] As long as the board's decisions with regard to personnel matters are not arbitrary, capricious, or pretextual, they will be upheld.[9] Under this rationale, the minimum standards of due process will be met if the hearing is limited to the issues of: (1) Was there a rational basis to determine a reduction in force was necessary? (2) Was the employment cancellation procedure arbitrary or capricious? (3) Was the decision to cancel the particular teacher arbitrary, capricious or pretextual? (4) Was the tenured teacher qualified to fill positions held by non-tenured teachers who were retained?[10]

In summary, an elaborate hearing procedure is not required to satisfy due process considerations in a reduction in force situation as it would be in a teacher dismissal case. As long as the tenured teacher has the opportunity for a hearing before the board on the issues of whether the reduction in force was arbitrary, capricious or pretextual, the teacher has been afforded due process.

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4. *Id.*
5. *See, e.g.*, Howell, *supra*, note 3.
6. Von Krog v. Board of Educ., 298 N.W.2d 339 (Iowa Ct. App. 1980).
7. *Id.*, *see also* Durfey, *supra*, note 3.
8. *See, e.g.*, Ball v. Weld Cty. School Dist. No. RE-3J, 545 P.2d 1370 (Colo. App. Ct. 1975); Newman v. Board of Educ., 424 N.E.2d 1331 (Ill. Ct. App. 1981); COLO. REV. STAT. § 22-32-110.
9. Newman, *supra*, note 8.
10. *See, e.g.*, Howell v. Woodlin School Dist. R-104, *supra*, note 3 interpreting the due process requirements of COLO. REV. STAT. § 22-63-112(3), the text of which appears above.

AVOIDING THE PRETEXTUAL REDUCTION IN FORCE

A reduction in force proceeding is one of the few situations in which a tenured teacher's right to continued employment is not fully protected by the applicable tenure statute. Because of this, it can be abused. In the case where a board desires to terminate a tenured teacher but cannot satisfy the applicable statutory grounds for dismissal or wishes to avoid the complicated statutory procedures for doing so, there is temptation to use a reduction in force as a pretext to circumvent the requirements for dismissing a teacher under the tenure statute.

The courts have been quick to respond to this possibility. In commenting on the school board's discretionary authority in a reduction in force, the Illinois Appellate Court stated:

> But we stress that this discretion must be exercised with the extreme caution and circumspection in order not to subvert another fundamental purpose of the Tenure Act, that being the protection of teachers from political, partisan, capricious, fickle, and irregular decision making. We are also not unmindful that particular school boards—whether in good faith or bad--may rearrange curriculum and teaching positions in ways which defeat the rights of tenured teachers. Such a practice cannot be tolerated under the guise of discretionary authority and duty.[11]

Similarly, in *Hagarty v. Dysart-Geneseo Community School District*,[12] the court stated, "we could not countenance a subterfuge by which an unscrupulous school board would use a fictitious necessity for staff reduction as a pretext for discharging a teacher." Therefore, a school board contemplating a reduction in force is going to have to examine its collective conscience to insure that there are substantive reasons underlying the perceived necessity to trim the professional staff in the district.

An analysis of the cases indicates that there are some circumstances which will generally always constitute substantive reasons for implementing a reduction in force. These circumstances can be broadly classified under the headings of either a financial exigency or a program change.[13] A financial exigency can occur any time that a school district, for budgetary reasons, is unable to maintain staffing at existing levels. A program change refers to any elimination, curtailment or reorganization of curriculum, or a reorganization or consolidation of individual schools, and does not necessarily have to occur for financial reasons.

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11. Newman, *supra*, note 8 at 1337.
12. 282 N.W.2d 92 at 98 (Iowa 1979).
13. *See*, Howell, *supra*, note 3; Cooper v. Fair Dismissal Appeals Bd., 570 P.2d 1005 (Or. Ct. App. 1977).

As long as there is a rational underlying basis for the board to either find a financial exigency or to require a program change within the school district, a reduction in force motivated by these conditions will withstand a legal attack based on the argument that it is merely a pretext for a teacher dismissal. Again, this is consistent with the broad exclusive and discretionary powers relating to curriculum and personnel matters which are vested in school boards by law.

In fact, the Utah Supreme Court affirmed a special jury verdict upholding the dismissal of a tenured teacher in a reduction in force where the jury found that even if there had been an improper motive in terminating the plaintiff (*i.e.*, on account of his activities in local and state education associations), he would have been terminated anyway as part of a reduction in force caused by a bona fide financial exigency and program change.[14] While this may be an extremist position given the possibility of an improper motive, it nonetheless illustrates the effect of being able to show a rational underlying basis for implementing a reduction in force should the decision be challenged in the courts.

Two conditions are always either expressly or impliedly acknowledged in the cases as constituting rationale bases for the board to either find a financial exigency or require a program change followed by a reduction in force. These conditions are declining student enrollment or budgetary cutbacks.[15]

Declining student enrollment does not have to occur across the board to justify elimination of teaching positions, although that most commonly is the case. Even if it is shown that enrollment in a particular program has declined the board may justifiably eliminate teaching positions in that program, or the entire program.[16] This frequently is necessary in smaller school districts which cannot afford the luxury of maintaining elective course offerings where there is not sufficient student interest. In this case, the fact that the overall student population in the school district may not have declined is not as germane as showing that enrollment for a particular program has declined to the point where it is no longer feasible to offer that program.

Finally, to defeat a pretext argument in the courts, there must be competent evidence on the record which supports the school board's reasons for implementing the reduction in force.[17] This evidence should

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14. Durfey, *supra*, note 3.

15. Von Krog, *supra*, note 6; Durfey, *supra*, note 3; Platko v. Laurel Highlands School Dist., 410 A.2d 960 (Pa. Commw. Ct. 1980); Bednar v. Butler Area School Dist., 410 A.2d 922 (Pa. Commw. Ct. 1980); Fort Sumner Mun. School Bd. v. Parsons, 485 P.2d 366 (N.M. 1971); Herbach v. Board of Educ., 419 N.E.2d 456 (Ill. App. Ct. 1981); Shandy v. Portland School Dist., 634 P.2d 1377 (Or. Ct. App. 1981).

16. *See, e.g.*, Cooper, *supra*, note 13.

17. Von Krog, *supra*, note 6.

ideally consist of the testimony of appropriate school officials given at the reduction in force hearing, along with any supporting exhibits. For this reason, a record should be made at the hearing.

In the final analysis, the courts are only interested in insuring that a reduction in force does not become a shortcut to defeat the rights of tenured teachers under the tenure statutes. For that reason they have, on occasion, required school districts undergoing a reduction in force to demonstrate that there are valid reasons justifying staff cutbacks. Because this involves essentially a "rational basis" test, it is not an undue burden for school districts to meet. Therefore, they should not be hesitant to implement a reduction in force when conditions justify it.

RETAINING QUALIFIED PROBATIONARY TEACHERS OVER UNQUALIFIED TENURED TEACHERS

When deciding how to implement a reduction in force, school districts need to be able to insure that tenure rights will not interfere with their ability to retain qualified teachers in the classrooms. A question which frequently arises is whether a qualified probationary teacher can be retained in preference to an unqualified tenured teacher. The answer is yes, especially if the decision on qualifications can be made with reference to objective criteria.

In general, probationary teachers must always be the first to go in any reduction in force.[18] Also, a school district must make the effort to transfer a tenured teacher to another position is eliminated.[19] However, when the issue was whether a tenured teacher was qualified to occupy the position held by the probationary teacher, the courts have carved out an exception and allowed school districts to lay off tenured personnel who were not qualified for a position while retaining probationary employees who were.[20]

The issue of how to judge who is qualified is of paramount importance. The cases express a strong preference for the use of objective criteria.[21] They indicate that for a teacher to be considered qualified for a position in a reduction of force situation, the following criteria must be met:

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18. *See, e.g.*, COLO. REV. STAT. § 22-63-112(3).
19. Cooper, *supra*, note 13.
20. Shandy, *supra*, note 15; Higgins v. Board of Educ., 428 N.E.2d 1126 (Ill. App. Ct. 1981); Herbach, *supra*, note 15; Lenard v. Board of Educ., 373 N.E.2d 477 (Ill. App. Ct. 1978); Evans v. Mount View School for Girls, 525 P.2d 1172 (Colo. Ct. App. 1974); Fort Sumner, *supra*, note 15.
21. *See*, Von Krog, *supra* note 7 at 343.

- The tenured teacher must possess a valid teaching certificate, endorsed for the subjects being taught in the probationary teacher's position.
- The teacher must possess any additional educational back ground requirements (usually semester hour requirements in specific subjects) required under regulations promulgated by state boards of education applicable to the position occupied by the probationary teacher. In this regard, the courts have upheld the state board's authority to promulgate these regulations in *Lenard v. Board of Education*.
- The teacher must meet any other requirements for the position imposed by the external authority which accredits the school district (*i.e.*, the North Central Association).[22]

As long as the tenured teacher meets these criteria, he or she will probably be considered qualified to bump a probationary teacher and occupy his or her position. This is true even if the probationary teacher may have more experience and training applicable to that particular position.[23] Conversely, failure to meet any one of them will allow the probationary teacher to be retained.[24]

The question also arises as to the time at which qualifications are to be judged by the school board. For example, tenured teachers who are unqualified for any other position at the time their position was eliminated have argued that they could upgrade their qualifications (*i.e.*, by attending summer courses to meet minimum semester hour requirements applicable to another position) so as to be able to occupy a position held by a probationary teacher. The courts have treated this argument with little sympathy and have ruled that the issue is one of *present* qualifications and not possible future qualifications.[25] A tenured teacher will not be allowed to bump a probationary teacher based on the pious hope that he or she will become qualified for the position in the future. From a school board's perspective, this is a favorable judicial response, since it will allow a board to make decisions about a teacher's qualifications based on the actual qualifications existing as of the time the decision is made rather than mere expectations about the future.

A tenured teacher seeking to bump a probationary teacher must be qualified for all aspects of the probationary teacher's position. If the tenured teacher is only qualified to teach some of the courses taught by the probationary teacher, he or she will not be considered qualified for

22. *See, e.g.*, Lenard, *supra*, note 20; Fort Sumner, *supra*, note 15.
23. Cooper, *supra*, note 13.
24. Lenard, *supra*, note 20.
25. Shandy, *supra*, note 15; Evans, *supra*, note 20.

the position, and the school district may retain the probationary teacher.[26]

Likewise, although the district is obligated to transfer tenured teachers into positions for which they are qualified, it does not have to create such a position for them where none formerly existed. A district does not have to make curriculum changes which would have the effect of opening up a position for which the teacher is qualified.[27] Also, the tenured teacher cannot insist that the district create a position for him by drawing one or two classes he is qualified to teach from other teachers whose positions he is otherwise not qualified to fill.[28] Finally, there is also authority to the effect that the district is not required to shuffle teaching assignments about in such a way that it would be unreasonably disruptive to the district simply to open up a position.[29]

In the final analysis, school boards have wide discretion and autonomy to insist that qualified teachers staff the classrooms. The importance of this is paramount to that of staff tenure rights in a reduction in force. For this reason, a decision to retain a qualified probationary teacher over an unqualified tenured teacher is permissible and has been affirmed by the courts when they have reached the issue.

CONCLUSION

The practitioner advising a school board in connection with a reduction in force can appreciate that the board has great flexibility in implementing its decision. As long as the board's actions are not arbitrary, capricious or pretextual, and they afford somewhat minimal due process protections to tenured teacher, the board's decisions will withstand judicial scrutiny. Understanding this will enable the board to devote a greater degree of their attention to making the difficult decisions associated with a reduction in force rather than worrying about the legal ramifications of their actions.

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26. Fort Sumner, *supra*, note 15.
27. *Id.*
28. Higgins, *supra*, note 20.
29. *See*. Shandy, *supra*, note 15; Von Krog, *supra*, note 6.